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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD LEE CONDON, Defendant and Appellant.	E066077 (Super.Ct.No. FWV802123) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Donald Lee Condon appeals from the denial of his petition for resentencing under Proposition 47, the Safe Neighborhoods and Schools Act. According to defendant, he is entitled to have two one-year prior prison term enhancements stricken from his current sentence because those prior convictions were reduced to misdemeanors after the passage of Proposition 47. Because defendant's sentence became final well before the passage of Proposition 47, and because the resentencing provision of Proposition 47 only applies prospectively to nonfinal prior prison term enhancements, the trial court correctly denied defendant's petition. We therefore affirm.

I.

PROCEDURAL HISTORY[1]

On August 6, 2010, defendant pleaded guilty to first degree residential burglary (Penal Code, § 459), and admitted to having suffered a prior serious or violent felony conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a prior serious felony conviction (Pen. Code, § 667, subd. (a)), and two prior convictions that resulted in prison terms (Pen. Code, § 667.5, subd. (b)), to wit, a 2005 conviction for possession of a controlled substance (Health & Saf., Code, § 11377, subd. (a)) and a 1995 conviction for second degree burglary (Pen. Code, § 459). Two months later, the trial court sentenced defendant to the upper term of six years for the first degree burglary conviction, doubled pursuant to the one-strike law, five years for his prior serious felony conviction, and one year each for the prior prison terms, for a total state prison sentence of 19 years.

[1] The underlying facts of this case are not relevant to the purely legal questions posed by this appeal.

Defendant timely appealed and, after his appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, this court affirmed the judgment. (*People v. Condon* (Aug. 2, 2011, E052230) [nonpub. opn.].) Defendant did not petition the California Supreme Court for review. The time for defendant to petition the United States Supreme Court for a writ of certiorari expired 90 days after we issued our opinion (U.S. Supreme Ct. Rules, rule 13.1; *Bowles v. Russell* (2007) 551 U.S. 205, 212), and the judgment became final the following day. (*People v. Vieira* (2005) 35 Cal.4th 264, 306 ["'a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed'"].)

The voters adopted Proposition 47 on November 4, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced to misdemeanors certain property and drug crimes that were previously felony wobblers. It also enacted Penal Code section 1170.18,[2] which provides for resentencing of defendants currently serving sentences for crimes that would have been misdemeanors had they been committed after the passage of Proposition 47, and also provides that defendants who have already completed their sentences for crimes that were reduced to misdemeanors under Proposition 47 may petition to have their convictions reclassified as misdemeanors. (*People v. Rivera*, at pp. 1091-1093.)

[2] All additional undesignated statutory references are to the Penal Code.

In August and December 2015, defendant successfully petitioned the Los Angeles County Superior Court to reclassify as misdemeanors his prior convictions for second degree burglary and possession of a controlled substance that were used to enhance his current sentence. The following March, defendant petitioned the San Bernardino Superior Court for resentencing in his current case, contending the two prior prison terms he admitted had been reduced to misdemeanors and should no longer be the basis for sentence enhancements.

At the hearing on defendant's petition, the court was under the mistaken impression that defendant sought to be resentenced on his first degree burglary conviction. Having concluded a conviction for first degree burglary may not be resentenced under Proposition 47, the court denied the petition. One month later, defendant's appointed attorney requested reconsideration of the order denying the petition. Counsel informed the court that defendant was not requesting resentencing on his first degree burglary conviction, but instead requested that his prior prison term enhancements be stricken because they were based on convictions that had subsequently been reduced to misdemeanors pursuant to Proposition 47.[3] The court concluded that

[3] Counsel mistakenly informed the superior court that one of defendant's now-reduced prior convictions corresponded to a prior prison term allegation that was dismissed as part of defendant's guilty plea and, therefore, defendant only sought resentencing on one of his prior prison term enhancements. To the contrary, the two prior convictions that have been reduced are the same two prior prison terms that defendant admitted as part of his guilty plea and for which the court sentenced defendant to two one-year sentence enhancements.

"once the prison term is completed, it remains a prison term under [section] 667.5(b) even if the underlying conviction for that prison term is subsequently reduced to a misdemeanor under Prop. 47." Therefore, the court once more denied the petition.

Defendant timely appealed.

II.

DISCUSSION

As previously stated, Proposition 47 reduced certain theft and drug crimes from felony wobblers to misdemeanors. (*People v. Rivera, supra,* 233 Cal.App.4th at p. 1091.) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Id*. at p. 1092.) "Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions 'designated as misdemeanors.' (§ 1170.18, subds. (f); see *id*., subds. (g)-(h).)" (*Id*. at p. 1093.) "If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).)

Defendant contends the resentencing provisions under section 1170.18 apply retroactively to prior convictions used to enhance the sentence on non-Proposition 47 eligible felonies because, by its terms, a felony wobbler that is reclassified or designated as a misdemeanor "shall be considered a misdemeanor for all purposes." (§ 1170.18,

subd. (k); hereafter § 1170.18(k).) The issue of whether a defendant is entitled to be resentenced on a current case after the superior court designates as a misdemeanor a prior conviction used to enhance the current sentence is pending before the California Supreme Court. (*People v. Valenzuela*, review granted Mar. 30, 2016, S232900.) We conclude the trial court correctly denied defendant's request to strike the two one-year enhancements based on defendant's now reclassified prior convictions for possessing a controlled substance and for second degree burglary.

The courts have held that reclassification of a prior felony conviction under Proposition 47 applies prospectively to enhancements, and that it does not apply to enhancements of sentences that are final. In *People v. Abdallah* (2016) 246 Cal.App.4th 736, the trial court recalled the defendant's prior conviction for possessing methamphetamine, reclassified the conviction as a misdemeanor under Proposition 47, then sentenced the defendant to a year in jail with credit for time served. (*Abdallah*, at pp. 740-741.) However, when the court sentenced the defendant on his current felony convictions, it imposed a one-year sentence enhancement under section 667.5, subdivision (b), for the same prior conviction. (*Abdallah*, at pp. 740-741.) The Court of Appeal held the trial court erred: "Once the trial court recalled Abdallah's 2011 felony sentence and resentenced him to a misdemeanor, section 1170.18, subdivision (k), reclassified that conviction as a misdemeanor 'for all purposes.' [Citation.] Therefore, at the time of sentencing in this case, Abdallah was not a person who had committed 'an offense which result[ed] in a felony conviction' within five years after his release on

parole for his prior conviction. [Citations.] Thus, the trial court erred by imposing the one-year sentence enhancement under section 667.5, subdivision (b)." (*Id*. at p. 746.)

In *People v. Jones* (2016) 1 Cal.App.5th 221 (*Jones*), review granted September 14, 2016, S235901,[4] the defendant pleaded guilty in his current felony case and admitted to suffering a prior prison term for petty theft with a prior (§ 666). (*Jones*, at p. 225.) The trial court sentenced the defendant to three years in county jail for the current offense and to a consecutive term of one year for the prior prison term. (*Id*. at pp. 225-226.) After passage of Proposition 47, the defendant successfully petitioned to have his prior conviction for petty theft with a prior reclassified as a misdemeanor. (*Jones*, at p. 226.) The defendant then petitioned the court in his current case to reclassify as a misdemeanor a prior conviction for second degree burglary (a prior he did not admit as part of his plea and that the trial court struck), and to reduce his current sentence by one year based on the reclassification of his prior conviction. (*Ibid*.) The trial court denied the request to reduce the sentence. (*Id*. at p. 227.)

In *Jones*, a panel of this court affirmed the denial of the defendant's request for a sentence reduction. This court held the provisions giving Proposition 47 retroactive effect do not apply to enhancements: "The focus of these procedures is redesignation of *convictions*, not enhancements. Neither procedure provides for either the recall and resentencing or the redesignation, dismissal, or striking of sentence enhancements.

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[4] Under a recent amendment to rule 8.1115 of the California Rules of Court, we may rely on published appellate court decisions as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

(§ 1170.18, subds. (a), (b), (f), (g).) No similar provision provides a process for offenders to seek to strike or otherwise redesignate sentencing enhancements. It follows that nothing in the language of section 1170.18 allows or even contemplates the retroactive redesignation, dismissal, or striking of sentence enhancements imposed in a final judgment entered before Proposition 47 passed, even where the offender succeeds in having the underlying conviction itself deemed a misdemeanor." (*Jones*, *supra*, 1 Cal.App.5th at pp. 228-229.)

Relying on section 1170.18(k), the defendant in *Jones* argued a reclassified felony conviction is a misdemeanor "for all purposes," and the trial court was required to reduce his sentence by striking the one-year enhancement. (*Jones*, *supra*, 1 Cal.App.5th at p. 229.) This court disagreed: "We assume, without deciding, that subdivision (k) bars a post-Proposition 47 sentencing court from imposing a section 667.5, subdivision (b) enhancement based on a prior felony conviction that has been redesignated as a misdemeanor. It does not follow, however, that subdivision (k) allows the courts to strike prison prior enhancements imposed prior to Proposition 47 based on prior convictions redesignated as misdemeanors after judgment and sentence have become final. The first case involves *prospective* application of section 1170.18, subdivision (k). The second case, which describes Jones's situation, involves its *retroactive* application." (*Id.* at p. 229.) Because this court concluded section 1170.18(k) does not apply retroactively to sentence enhancements that are final, we concluded the trial court correctly denied the defendant's request to reduce his current sentence. (*Jones*, at pp. 229-230.)

The defendant in *People v. Evans* (2016) 6 Cal.App.5th 894 (*Evans*), review granted February 22, 2017, S239635,[5] was convicted in 2015 of various non-Proposition 47 eligible felonies, and admitted to suffering a strike prior and a prior prison term based on a 2007 conviction for possession of a controlled substance. (*Evans*, at pp. 898-899.) Before sentencing, the defendant petitioned to have his 2007 possession conviction reclassified as a misdemeanor pursuant to Proposition 47, and requested that the sentencing court in his current case strike the one-year prior prison term enhancement based on the 2007 conviction. The People opposed the request to strike the enhancement, and the court denied the request and subsequently sentenced the defendant to a prison term that included the one-year prior prison term enhancement. (*Evans*, at p. 899.) While the defendant's appeal from the judgment was pending before this court, the trial court granted the defendant's petition and reclassified the 2007 possession conviction as a misdemeanor. (*Ibid.*)

In *Evans*, a panel of this court held expressly what the court assumed to be true in *Jones*—that Penal Code section 1170.18(k) *prospectively* prohibits use of a reclassified conviction as the basis of a prior prison term enhancement under Penal Code section 667.5, subdivision (b). "The plain language of Proposition 47 . . . explicitly anticipates misdemeanor reclassification will affect the collateral consequences of felony convictions. Among other things, suffering a felony conviction may result in the offender losing the right to vote (Elec. Code, § 2101), losing the right to own or possess a

[5] See *ante*, footnote 4.

firearm (Pen. Code, § 29800, subd. (a)(1)), being required to provide biological samples to law enforcement for identification purposes (§ 296, subd. (a)(1)), and, if the offender is convicted of a felony in the future, losing probation as a sentencing option (§ 1203, subd. (e)) and being exposed to sentence enhancements (§ 667.5, subd. (b)). To ensure qualified offenders gain relief from those collateral consequences, Section 1170.18(k) directs '[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm . . . .' (Italics added.)" (*Evans*, at pp. 900-901.) This court noted that the broad language in Penal Code section 1170.18(k) of "for all purposes" indicates "the voters intended it to apply to all collateral consequences except firearm possession," and we agreed with the court in *Abdallah*, *supra*, 246 Cal.App.4th at page 746, that "[s]ection 1170.18(k) prohibits a court from imposing an enhancement based on an offense that has already been reclassified a misdemeanor." (*Evans*, at p. 901.)

In addition, this court in *Evans* reiterated the holding in *Jones* that Proposition 47 does not apply retroactively to prior prison term allegations used to enhance sentences that have since become final. (*Evans*, *supra*, 6 Cal.App.5th at p. 902.) Applying *In re Estrada* (1965) 63 Cal.2d 740, this court concluded Evans was entitled to have his prior prison term enhancement stricken because his sentence was on appeal and, therefore, was not yet final when the trial court reclassified his prior conviction for possession of a controlled substance. "Under *Estrada*, when an amendatory statute mitigates

punishment, contains no saving clause, and 'becomes effective prior to the date the judgment of conviction becomes final,' then '[that statute] and not the old statute in effect when the prohibited act was committed, applies.' (*Estrada*, *supra*, 63 Cal.2d at pp. 744, 748.)" (*Evans*, at pp. 902-903.)

This court concluded the language "for all purposes" found in section 1170.18(k) "is broad and not limited by a saving clause that would indicate the voters intended offenders should continue being punished under the old law. The plain language of the statute therefore indicates the voters intended offenders should be able to avoid punishment for reclassified offenses imposed through Section 667.5[, subdivision] (b) enhancements, so long as they are not subject to final judgment. Consistent with this understanding, the statute specifies it does not apply to convictions or sentences that are subject to final judgment. (§ 1170.18, subd. (n) ['Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act'].) We therefore conclude the electorate, in passing Proposition 47, determined the penalties for drug possession crimes like Evans's were too severe and intended to reduce those penalties in every case to which the proposition constitutionally could apply. As a result, offenders may challenge prison prior enhancements based on reclassified convictions so long as the enhanced sentence is not subject to a final judgment." (*Evans*, *supra*, 6 Cal.App.5th at p. 903.) Because the judgment in *Evans* was on appeal and not yet final when the trial court reclassified the defendant's prior conviction, this court held the defendant was entitled to have the prior prison term enhancement stricken from his sentence. (*Id*. at p. 904.)

As noted, *ante*, the judgment in this case became final 90 days after we issued our opinion in defendant's direct appeal (i.e., in early Nov. 2011), three years before the voters adopted Proposition 47. Therefore, notwithstanding the fact that defendant's prior convictions have since been reclassified as misdemeanors, he is not entitled to have the prior prison term enhancements related to those convictions stricken from his current sentence.

Finally, defendant contends that providing the relief he seeks under Proposition 47 to persons whose enhanced sentences are not yet final but precluding relief to similarly situated persons whose enhanced sentences are final would violate the equal protection clauses of the state and federal Constitutions. The courts have rejected similar arguments. For instance, in *People v. Floyd* (2003) 31 Cal.4th 179, the defendant argued he was entitled to be placed on probation pursuant to Proposition 36 (§ 1210.1) because it was an ameliorative statute and his conviction, although predating the effective date of Proposition 36, was not yet final when it went into effect. (*Floyd*, at pp. 183-184.) Applying *Estrada*, the Supreme Court rejected the defendant's claim because Proposition 36 contained a savings clause and only applied prospectively to persons sentenced on or after the date it went into effect. (*Floyd*, at pp. 184-188.)

In the alternative, the defendant argued that distinguishing between nonviolent drug offenders such as himself whose pre-Proposition 36 convictions were not yet final on one hand, and nonviolent drug offenders convicted after the effective date of Proposition 36 on the other, violated his right to equal protection under the law. (*Floyd*, *supra*, 31 Cal.4th at p. 188.) The Supreme Court disagreed. "Defendant has not cited a

single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim—including this court. (*Baker v. Superior Court* (1984) 35 Cal.3d 663, 668 . . . ['"A refusal to apply a statute retroactively does not violate the Fourteenth Amendment"'], quoting *People v. Aranda* (1965) 63 Cal.2d 518, 532 . . . .) 'The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.' (*In re Kapperman* (1974) 11 Cal.3d 542, 546 . . . ; see also *People v. Willis* (1978) 84 Cal.App.3d 952, 956 . . . [acknowledging that 'all effective dates of statutes are somewhat arbitrary,' but rejecting equal protection claim]; *People v. Superior Court (Gonzales)* (1978) 78 Cal.App.3d 134, 142 . . . [same].) The voters have the same prerogative. (See *Rossi v. Brown* (1995) 9 Cal.4th 688, 696, fn. 2 . . . .)" (*Floyd*, at p. 188.)

Indeed, the Supreme Court noted that "*Estrada* itself recognized that when the Legislature has amended a statute to lessen the punishment, its determination as to which statute should apply to all convictions not yet final, '*either way*, would have been legal and constitutional.' (*Estrada*, *supra*, 63 Cal.2d at p. 744, italics added; *In re Bender* (1983) 149 Cal.App.3d 380, 388 . . . ['punishment-lessening statutes given prospective application do not violate equal protection']; *People v. Henderson* (1980) 107 Cal.App.3d 475, 488, fn. 5 . . . ['Retroactive application of a punishment-mitigating statute is not a question of constitutional right but of legislative intent']; *Talley v. Municipal Court* (1978) 87 Cal.App.3d 109, 114 . . . ['The short answer is *Estrada*, . . . which stated

lucidly that the Legislature is not compelled to give sentencing changes retroactive effect'].) That the Legislature's choice, either way, would be constitutional is the foundation for our oft-repeated statement that, in this type of circumstance, the problem 'is one of trying to ascertain the legislative intent—did the Legislature intend the old or new statute to apply?' (*Estrada, supra,* 63 Cal.2d at p. 744; [*People v.*] *Nasalga* [(1996)] 12 Cal.4th [784,] 791 (plur. opn. of Werdegar, J.) quoting *Estrada*; *In re Pedro T.* [(1994)] 8 Cal.4th [1041,] 1045 [same]; *People v. Francis* (1969) 71 Cal.2d 66, 76 . . . [same].) Defendant's equal protection argument presumes that the *Estrada* rule is constitutionally compelled. As we have stated repeatedly, it is not." (*Floyd*, *supra*, 31 Cal.4th at pp. 188-189.)

Because the voters could distinguish between final and nonfinal prior prison term enhancements when enacting Proposition 47, and that distinction does not implicate equal protection concerns, we must reject defendant's constitutional claim.

III.

DISPOSITION

The order is affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

CODRINGTON
J.